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In the

Supreme Court of the United States

OCTOBER TERM, 1969

No. 215

BERNARD SHAPIRO, Welfare Commissioner of State of Connecticut

Appellant,

v.

EDNA SOLMAN, Et Al

Apellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

JURISDICTIONAL STATEMENT

ROBERT K. KILLIAN
Attorney General
30 Trinity Street
Hartford, Connecticut

FRANCIS J. MACGREGOR
Assistant Attorney General
76 Meadow Street
East Hartford, Connecticut

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

JURISDICTIONAL STATEMENT

Judgment Appealed From

Appellant, Bernard Shapiro, Commissioner of Welfare, State of Connecticut, appeals from the final judgment of the specially-constituted United States District Court for the District of Connecticut. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The Opinion of the United States District Court for the District of Connecticut which is the subject of this appeal is not yet reported. A copy of the Opinion is attached hereto as Appendix A.

Jurisdiction

This action was brought by the appellee (plaintiff) in the U. S. District Court for the District of Connecticut under 42 U.S.C. Sections 1983 and 1988 and 28 U.S.C. 1343 (3) to declare Chapter 299, Section 17-87 (a) of the Connecticut General Statutes unlawful and unenforceable as it contravenes the United States Constitution, and it enjoins the appellant (defendant) from enforcing said statute against the appellees (plaintiffs), and it gives the appellees (plaintiffs) money damages because the enforcement of said statute has impaired her rights under Article IV, Section 2 (1) and Article XIV, Section 1 of the United States Constitution.

A special three judge court was convened to determine the cause pursuant to 28 U.S.C. Section 2281 et seq. In due course the matter was heard and an opinion was rendered on April 10, 1969 in favor of the appellees (plaintiffs) and a judgment pursuant to the opinion was entered on April 11, 1969 in her favor. From this judgment the appellant (defendant) has appealed.

The jurisdiction of the Supreme Court to review by direct appeal is conferred by 28 U.S.C. 1253. The following decisions sustain the jurisdiction of this Court to review a judgment on direct appeal from a three judge court:

United States v. *Georgia Public Service Commission*, 371 U.S. 285, 287.

American Federation of Labor v. *Watson*, 327 U.S. 582, 591.

Statutes Involved

Section 17-87 (a) of the Connecticut General Statutes is the statute involved and this statute is set forth in Appendix B which is attached hereto.

Questions Presented

The following questions are presented by this appeal.

A. Whether in *Tartaglio* v. *Department of I & A, Division of Public Welfare,* 246 A 2d 483; Certiorari denied U.S. Supreme Court, April 28, 1969, the issues of this case have already been decided favorable for the present appellant.

B. Whether Section 17-87 (a) is unconstitutional because it allegedly violates the 14th Amendment Section I of the United States Constitution.

C. Whether Section 17-87 (a) conflicts with the Social Security Act particularly the Sections in 42 U.S.C. 601-609.

D. Whether Section 17-87 (a) conflicts with the Supreme Court decision in *King* v. *Smith,* 392 U.S. 309.

E. Whether the three judge court erred: (1) by not allowing testimony in the lower court as to the willingness before marriage of the stepfathers to assume the support and care of the stepchildren to be. (2) by not allowing the appellant to show that the stepfathers were the persons who financed the divorces and in fact broke up the marriages of the appellees.

F. Could the Court grant damages to the appellees in the present case.

Statement of Facts

1. The appellees were the supervising relatives and the beneficiaries of Connecticut's aid to dependent children program until the remarriage of the adult female appellees to their present husbands.

Since the marriage to the present stepfathers, the appellant has either taken the children of these women off the aid

to dependent children program or reduced the welfare grant for these children below the amount that the child would have received if its mother had not remarried and was still on the aid to dependent children program.

3. The present stepfathers have now expressed the opinion that they are not willing to support the stepchildren of their respective marriages.

4. The appellant, pursuant to Section 17-87 (a) of the Connecticut General Statutes will give no financial assistance to the appellees if their income in the home is above the welfare standards for that area plus additional allowances as setup in Manual Volume I, Chapter 3, Section 345.3 of the Social Services Policies of Public Assistance.

5. If the income in the appellees' home is below welfare standards, the defendant welfare commissioner will give sufficient aid to bring it up to the standards plus additional allowances.

6. Under Section 17-87 (a) a stepfather with a family consisting of himself a wife and four stepchildren would be entitled to get welfare benefits for the children if he brought home a pay of less than $422.55 a month. This would be a minimum figure in Connecticut.

7. Under Section 17-87 (a) the same stepfather with a wife and four stepchildren could be making in excess of $800 a month and still get welfare benefits for the stepchildren.

8. In Connecticut 75% of the women on welfare with their children get remarried shortly after their divorce.

The Questions are Substantial

I.

WHETHER IN *TARTAGLIO* v. *DEPARTMENT OF I & A, DIVISION OF PUBLIC WELFARE,* 246 A 2d 483; CERTIORARI DENIED U. S. SUPREME COURT, APRIL 28, 1969, THE ISSUES OF THIS CASE HAVE ALREADY BEEN DECIDED FAVORABLY FOR THE PRESENT APPELLANT.

On April 28, 1969, this Supreme Court denied certiorari in an appeal from the State of New Jersey in *Tartaglio* v. *Department of I & A, Division of Public Welfare,* 246 A 2d 483. The stepfather statute in New Jersey allows the welfare commissioner to consider the stepfather's earnings as available for the support of his stepchildren even though the state law does not obligate him to furnish such support. This statute is very similar in language to Section 17-87 (a), the statute in question in the present case.

One of the grounds upon which reversal was sought in the *Tartaglio* case was the decision in *King* v. *Smith,* 392 U.S. 309. A reading of the Three Judge Court's opinion in the present case would also indicate that their decision was based on the *King* case. However in the *Tartaglio* case it is obvious that the present Supreme Court did not think that *King* v. *Smith* was applicable in the stepfather cases.

II.

WHETHER SECTION 17-87 (a) OF THE CONNECTICUT GENERAL STATUTES IS UNCONSTITUTIONAL BECAUSE IT ALLEGEDLY VIOLATES THE 14th AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. THE ALLEGED EQUAL PROTECTION VIOLATION:

Unless this Court is prepared to say that Section 17-87 (a) is constitutionally suspect legislation on its face, it would appear that the statute meets the four rules for testing discrimination in social legislation set forth in *Morey* v. *Dowd*, 354 U.S. 457, 463-464. First, the equal protection clause does not deprive the state of a wide scope of discretion and a statute having a reasonable basis will be upheld. Second, a failure of mathematical nicety or creation of some inequality is not offensive to the equal protection clause. Third, a classification will be sustained, if any state of facts can be reasonably conceived that would sustain it. Fourth, the burden is on the attacker to show no reasonable basis.

The Connecticut statute has done only what stepfathers traditionally have done before the days of state public assistance. If support was not forthcoming from the natural father, the stepfather supported, cared for, and disciplined the stepchildren. In many cases the stepfather adopted the stepchildren. If the Lower Court decision is upheld, the stepfathers would now have a monetary incentive not to adopt these stepchildren, a result certainly not consistent with public policy.

Connecticut like most states has been faced with an increasing burden of AFDC payments. It would seem because of this that Connecticut should limit their aid to the really needy and exclude children where there is a person who can in fact support and who has traditionally taken up this burden.

The Court should note from the Statement of Facts supported by the testimony in this case that the Connecticut law was not aimed at poor stepfathers, who are aided under the public assistance program, something that a natural father living with the family would not be entitled to.

Finally no evidence was presented by the appellees to

overcome the presumption of constitutionality which is required when social legislation, not racially aimed and not constitutionally suspect, is attacked.

B. THE ALLEGED DUE PROCESS VIOLATION.

The appellant assumes from the briefs filed by appellees that this is a claimed violation of substantive due process. If this is so, it would appear that the courts should not substitute their own social and economic beliefs for the judgment of the legislative body.

"Legislative bodies have broad scope to experiment about the economic problems, and this Court does not sit to subject the state to an intolerable supervision, hostile to the basic principles of our government, and wholly beyond the protection which the general clause of the 14th Amendment was intended to secure." *Ferguson* v. *Skrupa,* 372 U.S. 726, 730.

The question does arise what protection did the due process clause intend to secure? The appellant in the present case claims that the due process clause means exactly what the Court in *Rockin* v. *People of California,* 342 U.S. 165, 169 said it meant.

"Due process is a summarized constitutional guarantee of respect for those personal immunities which are so rooted in the traditions and conscience of our people as to be ranked as fundamental or are explicit in the concept of ordered liberty."

Certainly a stepfather, who knowingly enters a marriage where there are children and takes care of these children, upsets no traditional concept or no concept of ordered liberty. Also there is no violation of the sense of fairness and decency in requesting a stepfather who is financially able to support

his stepchildren. Actually the fundamental test in due process is fairness as judged by the average member of the community not a Three Judge Federal Court. "Due process is not measured by the yardstick of personal reaction or the sphygmogram of the most sensitive person, but by the whole community sense of decency and fairness that has been woven by common experience into the fabric of acceptable conduct." *Breithaupt v. Abram,* 352 U.S. 432, 436. See also *Douglas* v. *City of Jeannette, Pa.,* 130 F 2d 652, 657 & 658; affirmed 319 U.S. 157.

Finally the fact that stepfathers have fulfilled this job of supporting stepchildren for so many years should cause this Court to be very reluctant in interfering with legislation that merely codifies the status quo.

"The fact that a procedure is so old as to have become customary and well established in a community is of great weight in determining whether it conforms to due process for 'not lightly vacated is the verdict of quiescent years' ". *Anderson National Bank* v. *Luckett,* 321 U.S. 233, 244.

III.

WHETHER SECTION 17-87 (a) CONFLICTS WITH THE SOCIAL SECURITY ACTS.

One of the reasons the Three Judge Court reached its decision was because of the HEW regulation which states that a stepfather's income can only be considered if he is legally obligated to support the children under a state law of general applicability. 45 CFR 203.1, 33 Fed. Reg. 11290. By doing this the Lower Court has evidently rejected this Court's interpretation when it denied certiorari in *Tartaglio,* Supra. Also there is no language in the Social Security Law that remotely supports the HEW regulation.

Finally the appellant would urge the Court to follow the rejection of this HEW regulation by following the same rationale that motivated the Three Judge Federal Court for the Northern District of California. In companion cases No. 50238, *Lewis* v. *Stark,* and No. 50285 *Percy, et al* v. *Montgomery* that Federal Court said that the Social Security Act does not instruct states to consider only resources guaranteed by the legal consequences of a marital or biological relationship. Nor does the Act instruct the states to consider only resources whose receipt by the child has been proved.

IV.

WHETHER SECTION 17-87 (a) CONFLICTS WITH THE UNITED STATES SUPREME COURT DECISION IN *KING V. SMITH,* 392 U.S. 309.

In attempting to equate Section 17-87 (a) with the Alabama regulation involving *King* v. *Smith,* Supra the plaintiffs have ignored the historical and social realities of this country. No community in America ever expected that the casual paramour of a woman would be expected to support her children unless he were the father. In fact it would have been unusual and wholly unexpected for him to do so. But because of society's dislike for the type of conduct exhibited in the *King* case the legislatures have passed various criminal statutes to punish and discourage this flaunting of promiscuity in the community. Alabama, with all these criminal statutes at her disposal, attempted to impose a wholly artificial type of discouragement to this conduct, one without any historical precedence, and one that was aimed at the wrong people. Here the victims were the children.

In contrast with this the community has always expected that when a man entered into a marriage contract with a

woman who had prior children he was knowingly and willingly undertaking the burden of supporting the whole family to the best of his financial ability if it were necessary for him to do so. This Supreme Court from its own experience in life must certainly be aware that stepfathers in the community in which the individual judges grew up, brought up stepchildren without any complaint because it was the accepted, proper, social standard.

In the same context a woman marrying a widower with children clearly expected that she would handle all those duties of the natural mother. It would have been unusual for a stepmother to say to her new husband that he get an outside housekeeper to perform the tasks of taking care of her stepchildren. Just as the natural mother marries the stepfather for the very purpose of support and help with the children so does the widower with children get married. Thus if one follows the argument of the appellees to its logical conclusion, it would seem that the state should furnish and pay for a substitute housekeeper if the new stepmother were disinclined to take on her expected chores.

Another insurmountable problem that was created by the Alabama regulation was the expectation that the paramour should furnish support regardless of his financial ability, thus ignoring the economic realities of life. The Connecticut statute explicitly takes this problem into consideration and merely says that the stepfather's income shall be taken into consideration if the children apply for aid. It clearly follows, if the standard set down by the welfare commissioner shows that the stepfather has insufficient income to furnish a decent way of life, then the State of Connecticut will contribute the difference or if necessary take up the entire burden. If, however the natural mother marries a millionaire, there is a reasonable expectation that he will be able to take care of the children.

The Connecticut Statute was not passed to punish or discourage anyone. The statute merely codified what was already an accepted social fact, and actually the State of Connecticut went even further by offering to ease any burden if it were too heavy.

If the Lower Court decision in the present case is allowed to stand the unfortunate result will be that it is the Federal Courts who will be actually determining who is needy for purposes of AFDC, and it will be the Courts who will be imposing the eligibility requirements as to means. This certainly runs counter to this Court's statement in *King,* Supra, footnote 14, where the Court said ". . . and legislative history of the act also makes it clear that the states should have the power to determine who is needy for purposes of AFDC." And further along "thus the reports of the House Ways and Means Committee and Senate Finance Committee make clear that the states are free to impose eligibility requirements as to means."

V.

WHETHER THE THREE JUDGE COURT ERRED: FIRST, BY NOT ALLOWING TESTIMONY IN THE LOWER COURT AS TO THE WILLINGNESS BEFORE MARRIAGE OF THE STEPFATHERS TO CARE FOR AND SUPPORT THE STEPCHILDREN TO BE; AND SECOND, BY NOT ALLOWING APPELLANT TO SHOW THAT THESE STEPFATHERS WERE THE PERSONS FINANCING THE DIVORCES AND IN FACT BREAKING UP THE MARRIAGES OF THE APPELLEES.

During the trial the appellant called one John Hayes to testify. The appellees conceded his qualifications and there was no question that the records from which he was testifying were admissible as business records. Appellees' objection was based on confidentiality. However Section 17-83 (a) the con-

fidentiality statute waives confidentiality if the disclosure is to carry out the purpose of the AFDC chapter. The purpose of the testimony to be elicited was that the stepfathers could support the stepchildren, and just prior to the marriage said that they were willing to care for these children. This willingness would have put the case within the facts of *Tartaglio*, Supra. Another purpose of the offer was to show that in these cases the stepfathers were financing the divorces and were breaking up the marriage. Thus, if the appellees' contentions were upheld, the person breaking up the marriage will end up with a monetary gift from the state, a situation not particularly consistent with good public policy. It is the appellant's feeling that he should have been allowed to pursue the testimony as to these facts.

VI.

COULD THE COURT GRANT DAMAGES TO THE APPELLEES WHEN IT FOUND NO UNCONSTITUTIONAL ACTION ON THE PART OF THE APPELLANT.

The Lower Court Three Judge decision was not based on any unconstitutional action of the appellant but merely his claimed failure to follow HEW regulations. The Social Security Acts clearly define what the punishment is if a state does not follow the statutes. That state is deprived of its pro rata share of federal aid. There is nothing else in the statute about allowing welfare recipients to sue the state. It would seem further that an award of money damages to the appellees would be improper unless Connecticut had consented to be sued for money damages in this type of action. *Monaco* v. *Mississippi*, 292 U.S. 313, 324; *Ex parte State of New York No. 1*, 256 U.S. 490, 497.

Conclusion

The questions involved here are substantial and ought to be resolved by this Court. This Court would have appeared, to have reached the opposite conclusion by failing to grant certiorari in *Tartaglio,* Supra. Also a similar issue has been decided in opposite to the present Three Judge Court by a similar Three Judge Court in California.

Respectfully submitted,

ROBERT K. KILLIAN
Attorney General
30 Trinity Street
Hartford, Connecticut

By
FRANCIS J. MACGREGOR
Assistant Attorney General
76 Meadow Street
East Hartford, Connecticut

APPENDIX A

United States District Court

District of Connecticut

EDNA SOLMAN, on her own behalf and as next friend of VANCE GOSMAN and JAMES SOLMAN, on behalf of themselves and all others similarly situated

— v. —

BERNARD SHAPIRO, Commissioner of Welfare, State of Connecticut

} Civil 12,790

Before: Smith, *C. J.* and Blumenfeld and Clarie, *D. JJ.*

MEMORANDUM OF DECISION

Blumenfeld, *District Judge:*

Plaintiffs bring this class action[1] to challenge the validity of a statute relating to the administration of that part of Connecticut's comprehensive scheme of public assistance relating to Aid to Families With Dependent Children (AFDC). *See* Conn. Gen. Stats. §§ 17-84 to 17-107.[2] They are all recip-

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[1]Prior to the trial of this action several plaintiffs intervened in order to obtain temporary restraining orders against termination of aid grounded on the statute in issue. The action is properly a class action, however, under Fed. R. Civ. P. 23(a) and (b)(2), since the prerequisites of subsection (a) are met and since "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding relief with respect to the class as a whole . . ." *See* Notes of Advisory Committee on Rules, 28 App. U.S.C. Rule 23, at 1605 (Supp. III 1968): "Illustrative [of subsection (b)(2)] are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration." Because this action falls under subsection (b)(2), the notice requirements specified in subsection (c)(2) are not applicable.

[2]Connecticut along with every other state participates in the federal government's Aid to Families With Dependent Children program, under which the state receives substantial payments for federally approved plans of state aid to needy families with children. *See* 42 U.S.C. §§ 601, 602.

ients of AFDC benefits which the defendant has threatened to curtail in whole or part in each case because the needy children have a stepfather living in the house. Specifically, they challenge § 17-87(a) insofar as it provides that in determining the need of an AFDC recipient who has a stepparent, the income of the stepparent shall be considered as available for the support of the recipient. Plaintiffs contend that since a stepparent in Connecticut is not legally obligated to support the stepchild, *see Conn. Gen. Stats.* § 17-320, § 17-87(a) is inconsistent with Part A of Subchapter IV of the Social Security Act, 42 U.S.C. §§ 601-610, with federal regulations promulgated thereunder, 45 C.F.R. § 203.1, and with the due process and equal protection clauses of the fourteenth amendment.

The cause of action is based on 42 U.S.C. § 1983 and jurisdiction is founded on 28 U.S.C. § 1343.[3] Since plaintiffs seek an injunction restraining enforcement of a state statute on constitutional grounds that are not insubstantial, *cf. Utica Mut. Ins. Co.* v. *Vincent*, 375 F. 2d 129, 130 (2d Cir.), *cert. denied*, 389 U.S. 839 (1967), a three-judge district court has been convened pursuant to 28 U.S.C. §§ 2281, 2284.[4]

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[3]*See King* v. *Smith*, 392 U.S. 309 (1968). In that case, almost identical with the present one, jurisdiction was founded on §§ 1343(3) and (4), since an equal protection claim was presented. The Court pointed out:

> "We intimate no views as to whether and under what circumstances suits challenging state AFDC provisions only on the ground that they are inconsistent with the federal statute may be brought in federal courts." *Id.* at 312 n.3.

Thus, even though the case was decided on statutory grounds alone, the presence of a constitutional claim was sufficient to resolve the jurisdictional question.

[4]In *King* v. *Smith*, 392 U.S. 309 (1968), the Supreme Court held that a three-judge district court was properly convened. Where both substantial constitutional claims and claims based on a conflict between state and federal laws are asserted, as here, a three-judge district court is required even if the constitutional issues are not reached and the injunction is issued on supremacy grounds alone. *Brotherhood of Locomotive Eng'rs.* v. *Chicago, R. I. & Pac. R. R.*, 382 U.S. 423 (1966); *see Florida Lime & Avocado Growers, Inc.* v. *Jacobsen*, 362 U.S. 73 (1960).

The portion of the statute challenged, Conn. Gen. Stats. § 17-87(a), provides in part:

> "In the determination of such need [of the dependent children], the ability and income of a stepparent shall be considered as available for the support of the family, including himself, his wife, and his minor stepchild or stepchildren residing with him . . ."

The statute is implemented by a regulation which provides in part:

> "When an employed stepparent is in the home, eligibility in regard to the need requirements exists only if the stepparent's income together with other available income is insufficient to meet total family need . . . ."[5] 1 Conn. State Welfare Manual § 345.3.

Under the scheme of cooperative federalism for carrying out the AFDC program, state plans for distribution of aid must conform with federal laws and regulations, in order for the state to receive federal funds. 42 U.S.C. §§ 602, 1302. One such regulation is 45 C.F.R. § 203.1, which reads in part:

> "(a) A State plan for aid and services to needy families with children under part A of title IV of the Social Security Act, to be approved under section 402 of such Act (42 U.S.C. 602), must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to a

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[5]There is no provision in either the state statute or regulation that allows the recipients to show that the step-parent's income is in actuality *not* being used for the children's support.

child's *stepparent who is* ceremonially married to the child's natural or adoptive parent and is *legally obligated to support the child under State law* of general applicability, which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children.

"(b) *The inclusion in the family, or the presence in the home,* of a 'substitute parent' or 'man-in-the-house' or *any individual other than one described in paragraph (a) of this section is not an acceptable basis* for a finding of ineligibility or *for assuming the availability of income by the State.* . . . [I]n the consideration of all income and resources in establishing financial eligibility *and the amount of the assistance payment,* only such income as is actually available for current use on a regular basis will be considered, *and the income only of the parent described in paragraph (a) of this section will be considered available for children in the household in absence of proof of actual contributions.*" 45 C.F.R. § 203.1, 33 Fed. Reg. 11290 (emphasis added).

This federal regulation was issued in the wake of the Supreme Court's decision in *King* v. *Smith,* 392 U.S. 309 (1968). In that case the validity of Alabama's "substitute father" regulation was challenged. Under it, Alabama had denied AFDC payments to the children of a mother who cohabited with any single or married able-bodied man. Alabama's regulation was based on an interpretation it gave to the definition of "dependent child" in 42 U.S.C. § 606(a): "a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a *parent,* and who is living with [any of several listed relatives] . . . ." (Emphasis added.) Alabama considered the "substitute father" not to be an absent "parent" within the federal statute, and con-

sequently held that a child in such a home did not qualify as "a dependent child."

The Supreme Court rejected this analysis. It noted that under Alabama law a "substitute father" was not among those legally obligated to support the child. The Court went on:

> "The question for decision here is whether Congress could have intended that a man was to be regarded as a child's parent so as to deprive the child of AFDC eligibility despite the circumstances: (1) that the man did not in fact support the child; and (2) that he was not legally obligated to support the child. . . . We think the answer is quite clear: Congress must have meant by the term 'parent' an individual who owed to the child a state-imposed legal duty of support." 392 U.S. at 329.

It follows from this detailed analysis by the Supreme Court that Connecticut's statute providing that "the income of a stepparent shall be considered as available for the support of his minor . . . stepchildren residing with him" squarely contravenes the regulation which states that that "is not an acceptable basis . . . for assuming the availability of income by the State." Connecticut does not have a state law of general applicability imposing an obligation on a stepfather to support his minor stepchildren. *Ladd* v. *Welfare Comm'r*, 3 Conn. Cir. 504, 507 n.5 (1965). *See* Conn. Gen. Stats. § 17-320.

In an attempt to avoid the full thrust of *King* v. *Smith*, the state asks us to focus attention on a different provision of the federal statutes where parental relationship is not a factor bearing upon a child's qualification for benefit payments but is claimed to affect only the amount of such payments. The section is 42 U.S.C. § 602(a) (7), the relevant portion of which provides that the state welfare agency "shall, in deter-

mining need, take into consideration any other income and resources of any child or relative claiming [AFDC], *or of any other individual (living in the same house as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid . . .*" (Emphasis added.) Using this text, the state argues that since the income of the stepfather living in the home is taken into account only in determining the "total family need," it is not relying upon the stepfather's income to find a stepchild *ineligible* for assistance under § 606(a), and, therefore, *King* v. *Smith is inapposite.*

Since the state relies upon this emphasized portion of § 602(a) (7) to support the action it has taken against these plaintiffs, the question of its applicability must be examined. If the theory of the state rests on the conclusion that the needs "of any other individual (living in the same house as such child . . .) whose needs the State determines should be considered in determining the need of the child" permit it to take into account the income of the stepparent to reduce or discontinue the payments for aid to stepchildren, it misreads the statute. The textually interlocked "other individual" has a special meaning.

Essential Person

Of course, what standards of welfare assistance a state may adopt which will qualify for its receipt of federal funds depends on the Social Security Act. A state's plan may provide for certain special needs, not necessary for all individuals. Section 602(a) (7) recognizes the validity of such a type of special need.[6] It takes into account cases where it is

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[6]The portion of § 602(a)(7) emphasized above was introduced into the Act by the amendment of 1968. Pub. L. 90-248, § 202(a). The Report of the Committee on Ways and Means describes the new provision and states that it "makes no change in present law." H.R. Rep. No. 544, 90th Cong., 1st Sess. at 174 (1967).

found desirable to provide a qualified recipient of assistance with something more than what is necessary for mere physical subsistence. An example would be a case of a child whose mother works and there is also another child in the family above the age for eligibility for aid to dependent children. However, the state may consider that the continued presence in home of the older child is essential to the *well-being* of the younger child (as distinguished from the necessaries to support life) and serves to strengthen family life, and thus may include his needs in the family budget. Although the need of the older child is met, it is not a "recipient" of benefits.

Thus, in such a case, under § 602(a) (7) an individual living in the house whose needs and income "should be considered *in determining the need of the child or relative claiming such aid*" is called by those in charge of administering AFDC an "essential person." The Department of Health, Education and Welfare's (HEW) "essential person" rule permits a state "to establish the need of the individual on a basis that recognizes as essential to him the presence in the home of other needy persons . . . ." IV Handbook of Public Assistance Admin. § 3131(4). Accordingly in any case where there is a decision that an "essential person" is necessary, although ineligible in his own right for public assistance, *his* needs could be "comprehended in the [eligible] individual's need." *Id.* The effect of the rule, therefore, enlarges the eligible individual's budget to comprehend the needs of the "essential person" as well as his own. In other words, needs and income of an "essential person" are taken into account only to determine whether the recipient's budget should be enlarged. One who serves as an "essential person" may or may not have needs of his own depending on his resources or income, but he is not the relative or child claiming aid, and is not, therefore, a "recipient" of aid. The answer to whether one who happens to be an "essential person" is *obligated* to provide support for the recipient must be sought elsewhere.

Furthermore a state's plan which provides a basis for recognizing that another person's presence in the home is essential to the well-being of a recipient is one thing. Who decides whether that particular individual is essential is another. HEW's "essential person" rule provides:

> "A State plan . . . must . . .
>
> * * * *
>
> "[6] (ii) Provide that the decision as to whether any individual will be recognized as essential to the recip ient's well-being shall rest with the recipient." Regulations on "Need-Requirements for State Public Assistance Plans," item 3.B.6, Interim Policy Statement No. 4 (33 Fed. Reg. 10230 (1968)).

In these cases, each of which involves a stepparent, only the children and the mothers are recipients, i.e., "claiming aid," and in none of them has a recipient chosen a stepfather as an "essential person." The defendant does not have the right to designate or to assume that a stepfather is an essential person to invoke the operation of § 602(a) (7).

Resources of Child or Relative.

The alternative clause in the section furnishes no support for the state's theory. Stripped of any characterization of the stepfather as an "essential person," the state may not assume that the stepparent's "income and resources" are available for the support of the child under § 602(a) (7). In adverting to this same section of the Act in *King* v. *Smith*, the Supreme Court gave a narrow reading to "resources of any child or relative." It stated:

> "Regulation of HEW, which clearly comport with the statute, restrict the resources which are to be taken into

> account under § 602 to those 'that are, *in fact,* available to an applicant or recipient for current use on a regular basis . . . .' [Citing IV Handbook of Public Assistance Admin. § 3131(7)]. This regulation *properly excludes from consideration resources which are merly assumed to be available to the needy individual.*" 392 U.S. at 319 n. 16 (emphasis added).

In light of this interpretation of § 602(a) (7) by the Supreme Court, the state's reliance on that clause of that section is misplaced.

With respect to children who are beneficiaries of AFDC payments, the income of a stepparent cannot be assumed to be available to his stepchildren living in the same home with him. The stepfather is neither a "relative claiming aid" nor an essential person. His income or his resources may be taken into consideration only if they are actually available for the use of the children. To permit the Welfare Commissioner to predict that every stepfather will support his minor stepchildren, and even more demandingly, to conclusively presume that he will do so would also be at odds with the federal regulation. Where the support of a child is at stake, the only relevant circumstance which may relieve the state of its duty to provide AFDC support for a needy child is whether its stepfather did in fact support the child.

There is no doubt that the state may properly take into account amounts actually expended by the stepparent in support of the stepchildren. See *King* v. *Smith,* 392 U.S. at 319. But the flat provision of the Connecticut statute requires that "the income of a stepparent shall be considered as available for the support of the . . . stepchild" whether so used or not. Since the stepparent is not under a legal duty to support the stepchild under Connecticut law (and because the stepparent may not be assumed to be an "es-

sential person"), Conn. Gen. Stats. § 17-87(a), on its face and as applied, is in contravention of 42 U.S.C. § 602(a)(7) as interpreted in *King* v. *Smith* and of the regulations issued by HEW. See *King* v. *Smith,* 392 U.S. at 333 n. 34; *Ivanhoe Irrigation Dist.* v. *McCracken,* 357 U.S. 275, 295 (1958). This conclusion makes it unnecessary to consider plaintiffs' constitutional claims. See *King* v. *Smith,* 392 U.S. at 333. Accordingly, the court DECREES and ADJUDGES that judgment enter permanently enjoining the defendant from withholding or reducing payments to the plaintiffs and other members of the class on the ground that they are barred from receiving such assistance under the stepparent provisions of § 17-87(a) of the Connecticut General Statutes or the regulations promulgated thereunder to the same extent and on the same terms as now provided by the temporary injunction heretofore issued.

Retroactive Damages

In addition to injunctive relief, the plaintiffs seek retroactive payments of amounts wrongfully withheld pursuant to § 17-87(a). Connecticut welfare regulations applicable to fair hearing procedures by the state welfare department provide that "a decision [at a fair hearing] in favor of appellant applies retroactively to the date the incorrect action was taken." Conn. State Welfare Manual § 6300(7). *See* IV Handbook of Public Assistance Admin. § 6200(k). These provisions reflect the federal policy as stated by HEW in a letter to all state welfare agencies:

> "Federal policy provides that effective July 1, 1968, corrective payments are to be made retroactively to the date incorrect action was taken when a hearing decision is favorable to the claimant . . . ." State Letter No. 1048, from the United States Department of Health, Education and Welfare to State Agencies Administering Approved Public Assistance Programs, Sept. 30, 1968.

Since the state welfare agency has already established a procedure whereby retroactive damages for payments wrongfully withheld may be determined, the petitioner's prayer for damages is remanded to the Connecticut Department of Welfare for its determination in light of this decision and the applicable regulations of the United States Department of Health, Education and Welfare and the Connecticut Department of Welfare. See *Robinson* v. *Washington,* Civ. No. 3399-66 (D. D.C. Nov. 18, 1968).

Dated at Hartford, Connecticut, this day of April, 1969.

J. Joseph Smith
United States Circuit Judge

M. Joseph Blumenfeld
United States District Judge

T. Emmet Clarie
United States District Judge

APPENDIX B

Section 17-87 (a) General Statutes of Connecticut Revised to 1968.

(a) Aid shall be granted on behalf of such dependent child or children and for the needs of such supervising relative to any such relative eligible therefor under this part to an extent adequate to enable the relative caring for such child or children, together with all other available income and support, to maintain a standard of living in the home reasonably compatible with health and decency for such child or children. In the determination of such need, the ability and income of a stepparent shall be considered as available for the support of the family, including himself, his wife, and his minor stepchild or stepchildren residing with him, and a stepparent is defined for the purposes of this section as one who marries the parent of a minor child or children of whom such stepparent is not the actual parent. The amount of the aid shall be determined in accordance with standards of assistance established by the commissioner.

APPENDIX C

United States District Court
District of Connecticut

EDNA SOLMAN, on her own behalf and as next friend of VANCE GOSMAN and JAMES SOLMAN, on behalf of themselves and all
— v. —
BERNARD SHAPIRO, Commissioner of Welfare, State of Connecticut

Civil 12,790

JUDGMENT

The Court having filed its Memorandum of Decision on April 10, 1969, directing that a permanent injunction enter against defendant and that the prayer for retroactive damages be remanded to the Connecticut Department of Welfare,

It is ORDERED, ADJUDGED AND DECREED

(1) That the defendant Bernard Shapiro, Commissioner of Welfare, State of Connecticut, his servants, employees, attorneys and all persons in active concert and participation with them are hereby permanently enjoined from withholding or reducing payments to the plaintiffs and other members of the class similarly situated on the ground that they are barred from receiving such assistance under the stepparent provision of Section 17-87 (a) of the Connecticut General Statutes or the regulations promulgated thereunder,

(2) That minor members of the class, whose aid has been terminated or reduced under said statute, be restored to full assistance under Connecticut's aid to Families with Dependent Children Program and that such assistance include full allotments for the following:

Food, Clothing, Personal Incidentals, Household Supplies, Food Stamps, and Medical Assistance, and their proportionate share of Cooking Fuel, Electricity, Hot Water, Heat and Shelter,

(3) That they be restored to any other assistance that is available to recipients of Connecticut's Aid to Families with Dependent Children Program,

(4) That plaintiffs' prayer for retroactive damages for payments wrongfully withheld is hereby remanded to the Connecticut Department of Welfare for its determination in light of this decision and the applicable regulations of the United States Department of Health, Education and Welfare and the Connecticut Department of Welfare.

Dated at New Haven, Connecticut this 11th day of April, 1969.

GILBERT C. EARL
Clerk, United States District Court

By THOMAS A. GRIMES
Chief Deputy Clerk